SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

Coordination Proceeding Special Title (Rule 1550 (b))	JCCP No. 4042 Volume II
In re TOBACCO CASES II	
This document relates to: The People of the State of California, et al. v. Philip Morris Incorporated, et al., Los Angeles Superior Court Case No. BC 194217;	
The People of the State of California, et al., v. General Cigar Co., et al., San Francisco Superior Court Case No. 996780;	
The People of the State of California, et al. v. Brown & Williamson, et al., San Francisco Superior Court Case No. 996781; and	
The People of the State of California, et al. v. Tobacco Exporters, et al., San Francisco Superior Court Case No. 996780	

DEPOSITION OF:

C. ANDERSON JOHNSON, Ph.D

FRIDAY, SEPTEMBER 3 1999

9:00 A.M.

Reported by: GINA M. CLOUD

CSR No. 6315

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Deposition of C. ANDERSON JOHNSON, Ph.D, the witness, taken on behalf of the DEFENDANTS, on Friday, September 3, 1999, 9:00 A.M. At 1540 Alcazar Street, Room 210, Los Angeles, California, before GINA M. CLOUD, CSR No. 6315, pursuant to NOTICE.

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LOS ANGELES, CALIFORNIA, FRIDAY, SEPTEMBER 3, 1999

9:00 A.M.

C. ANDERSON JOHNSON, Ph.D,

having been first duly sworn, was

examined and testified as follows:

EXAMINATION

BY MS. CORASH:

Q. Good morning, Dr. Johnson.

A. Good morning.

Q. Yesterday, when we began, Mr. Cafferty went over with you the procedure for depositions. Do you recall those, or would you like to go over them again this morning?

A. I think I recall them.

Q. As I mentioned yesterday, I represent the defendants in a case brought by the City of San Jose, and an individual named Paul Dowhall against manufacturers and distributors of cigars, and that

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case has been coordinated in San Diego with another case brought by the City of San Jose and Paul Dowhall against manufacturers of cigarettes, and it's also been coordinated with a case brought by the City of Los Angeles against manufacturers of cigarettes and retailers of cigarettes and cigars.

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MR. BROOKEY: I'm sorry, before you go on, I need to correct the record. It was kind of mentioned yesterday. The case to which Miss Corash is referring was not brought by the City of Los Angeles. It was brought by the people of the State of California, by and through the City Attorney for the City of Los Angeles.

BY MS. CORASH:

Q. But you understand there are three different cases that have been coordinated, and that I represent the defendants in one of those?

A. Yes.

Q. And the defendants I represent are manufacturers of cigars?

A. Yes.

Q. Yesterday you went over with Mr. Cafferty the work you had done under the grants that are referenced in your declaration. Was any of that work directed to environmental tobacco smoke from cigars, as distinguished from cigarettes?

A. Not specified as such, no.

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Q. Did any of the work involve evaluation of the public understanding of the risk of environmental tobacco smoke from cigars, as distinguished from cigarettes?

A. I'm not certain, but I don't believe so.

Q. You also have attached to your

declaration a very long, impressive bibliography. Are any of the papers in that bibliography papers that, articles that address environmental tobacco smoke from cigars? Again, as distinguished from cigarettes.

A. I don't believe so.

Q. Would it be fair then to conclude that when you testified yesterday about your work and you referred to smoking, that you were referring to smoking cigarettes, rather than smoking cigars?

MR. BROOKEY: I'll object as lacking foundation, calling for speculation. It's compound to the extent it calls for a single response to several hours of discussion, but if it's possible, then he may answer.

THE WITNESS: No, I couldn't characterize it that way, because there is cigar smoking in the homes, although we don't ask directly about exposure to cigar smoke. We have the ability to look at

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relationship between the cigar smoking in the home, and among children, which has increased dramatically, and friends of the respondent, so we can look at it that way.

BY MS. CORASH:

Q. Are you aware of any data on cigar smoking in the home.

A. I am aware we have data.

Q. When you say "we," to whom are you

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referring?

A. USC.

Q. Is that published data?

A. Not yet.

Q. It's going to be published?

A. I'm sure it will be.

Q. Is it data that can be made available to the parties in this case?

A. The same restrictions apply that I described yesterday under contract with the Department of Health Services. We cannot release the data.

Q. The data you're referring to on cigars in the home then, if I understand correctly, is data that was collected in connection with your work on the independent evaluation?

A. That's correct.

Q. Is there any data that you are aware

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of, other than data collected in connection with the independent evaluation?

A. Not that I'm aware of.

Q. Are you able to tell us when that data was collected?

A. As I described yesterday, that whole monitoring system was put into place in the second half of 1996 -- I mean `97, and the first half of 1998.

Q. When did the data --

A. May I correct myself?

Q. Sure.

A. 1998, 1999 were the years.

Q. Second half of 1998, first half of 1999?

A. I believe that's right, yes.

Q. And when did you personally have access to that data?

MR. BROOKEY: Let me just ask for a point of clarification. To the extent the data were collected over a period of time, is the question directed to all the data once they were compiled, or as a process?

MS. CORASH: I'm referring only to data on cigars in the home.

THE WITNESS: The period of access beginning

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as the data start coming in, so with the telephone data, in some ways we have access to some of the data very early in the collection period. Access is complicated because data come in, but they mean nothing until they have been -- the data files have been created and some data runs have begun to happen, so in some sense, access early in that period, in some sense access only very recently.

BY MS. CORASH:

Q. When you prepared document number 59, the Position Paper, were the conclusions in this paper based on the cigar data that you referred to

in our immediately preceeding conversation?

MR. BROOKEY: Objection, compound, vague and ambiguous.

THE WITNESS: No, the different data set, different items.

BY MS. CORASH:

Q. Just to be clear, because I think my question may have been a little ambiguous. Let me be sure I understood what you just said. Let me summarize my understanding of what you said, and you tell me if it's correct. This Position Paper does not reflect the data on cigars which has been coming in as part of the independent evaluation?

A. That's correct.

Q. Is the same true of your declaration?

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A. Yes, the same is true.

Q. So your declaration is not, if I understand correctly then, your declaration is not based upon data specific to cigars?

MR. BROOKEY: Objection, mischaracterizes the witness' prior testimony, but he can answer.

THE WITNESS: I'm not sure. Let me say there is -- it's not dependent upon the kind of data that I spoke of a moment ago. I believe that there was a kind of cigar question asked of children in the earlier data set.

BY MS. CORASH:

Q. What question was that?

A. Their use.

Q. Use by children?

A. Right.

Q. Are you aware of any questions asked regarding environmental tobacco smoke from cigars?

A. Not specific to cigars.

Q. Are you aware of any questions that were asked regarding smoking of cigars in the work place?

MR. BROOKEY: Objection, irrelevant to the subject matter of this litigation and not reasonably calculated to lead to the discovery of admissible evidence, but you may answer.

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THE WITNESS: Am I aware? At this moment I'm not aware whether we included such items, I cannot remember.

BY MS. CORASH:

Q. Were there any questions asked regarding smoking in the home? Let me strike that. Are you aware of any questions that were asked in the materials on which you based your declaration regarding smoking in the home?

A. Yes.

Q. What are those?

A. Could you ask the question again?

Q. What questions were asked regarding smoking in the home which formed the basis for your declaration?

A. There were questions, and again as yesterday, I can't cite word for word the questions, but there were questions that got at the issues of who smoked at home, not by name, but by relationship; parent, sibling. Frequency. I cannot recall if we asked what they smoked.

Q. Whether they smoked cigars?

A. Correct, in that data set.

Q. So again, let me see if I understand the testimony you've just given. In preparing your declaration, you did not rely upon any data specific to cigar smoking in the home, as distinguished from

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cigarette smoking in the home?

MR. BROOKEY: I'll object as mischaracterizing the prior testimony, but he can answer.

THE WITNESS: In a probabalistic sense, yes, because we had the probability of smoking cigars among these people, but not specific to.

BY MS. CORASH:

Q. What is the probability of smoking cigars --

A. I can't say.

Q. Can you tell me whether your knowledge of the probability of smoking cigars is based upon published literature?

A. Yes, it is.

Q. Is that referenced in your

declaration?

A. I don't recall.

Q. Do you recall what that literature is?

A. No, I don't recall.

Q. But you know that it's published literature?

A. Yes, I know that the prevalence of cigarette smoking among adults in the American population is published.

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Q. What about the prevalence of cigar smoking in the home?

A. The home I don't know. Prevalence of cigar smoking in the population, yes.

Q. I want to ask you about a couple of the statements in your declaration, and I'll try to wrap it up. Paragraph 12 of your declaration, you say that a vast majority of non-smokers do not take steps to protect themselves from environmental tobacco smoke. And you cite here and elsewhere in your declaration the study on which that conclusion is based.

Do you know what proportion of those non-smokers who take steps to protect themselves are exposed to cigar smoke as distinguished from cigarette smoke?

A. No, I do not.

Q. On page 5, continuing to page 6,

paragraph 26, you cite statistics which I believe come from the independent evaluation; is that correct? On the proportion of smoke-free households. Is it correct that that comes from the independent evaluation?

A. Let me just confirm.

MR. BROOKEY: I think the question is probably vague and ambiguous, unless you can specifically identify which item is the proportion

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of those non-smoking households.

THE WITNESS: This is a problem because some of the data systems reported were directly from the i.e., independent evaluation. Some were via other California monitoring systems.

BY MS. CORASH:

Q. Let's take them one at a time. I was just trying to save time here. 60 percent of California's pre-school children living in households where all adults smoke do not live in a smoke-free household. Does that come from the IE?

A. Let me refer to where we report this. I believe this is the summary statement.

Q. Yes, I believe there's more detail.

A. If you know where that is.

Q. I think it's on page 32. Here you have in parentheses --

A. Yes, this was the question I have, and this is from Dr. Pierce's report from what is

referred to under different names, California Adult Tobacco Survey, California Tobacco Survey, different names. And it's a different monitoring system. Those data in this Position Paper, we pulled from his published reports.

Q. And do you know whether that study looked at -- looked separately at households in

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which the smoker smoked cigars, as distinguished from smoking cigarettes?

A. I do not recall.

Q. Do you know the percentage of households in which the smoker is a cigar smoker that are smoke-free as distinguished from the percentage of households in which the smoker is a cigarette smoker?

A. I'm not sure I understand the question.

Q. Let me rephrase it. Your declaration states that 60 percent of smoking households are not smoke-free. It might help if you define what you mean by smoking household.

A. A smoking household is a household in which some member of that household smokes.

Q. Do you know the percentage of smoking households that are smoke-free where the person who smokes is a cigar smoker only?

A. I do not know that.

Q. On page 12 in the sentence that

begins on line 11, you cite a study of the number of non-smokers that say they would leave the room or ask the smoker to leave the room where there is environmental tobacco smoke. I take it it's where there is someone smoking?

A. Yes.

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Q. Do you know the percentage of non-smokers that ask the smoker to leave the room, or who themselves leave the room where the smoker is smoking cigars?

MR. BROOKEY: I'll object as compound, but he can answer.

THE WITNESS: No, I do not.

BY MS. CORASH:

Q. Do you have an opinion on whether the percentage would be different if you were comparing the actions of non-smokers exposed to cigar smoke, as opposed to cigarette smoke?

MR. BROOKEY: I'll object, lack of foundation, incomplete hypothetical, outside the scope of the expert declaration, but he can answer.

THE WITNESS: It would only be speculation, and I try not to make guesses outside of the data.

BY MS. CORASH:

Q. And then on page 5 of your declaration, and continuing to page 6, you talk about the three groups that are most vulnerable to ETS exposure; children, workers in businesses with

fewer than 15 employees, and three minority groups. I beg your pardon, two minority groups. Focusing on the last of those three, do you have any information -- do you have data on the proportion of

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African-Americans who smoke cigars, as distinguished from cigarettes?

MR. BROOKEY: I'm going to object in that the question is vague and ambiguous, but if it's possible, I think he can answer.

THE WITNESS: We have ethnic identity of all of your respondents, adult and youth, and we asked the question about cigar smoking.

BY MS. CORASH:

Q. What did you find in response to that question?

A. I don't know.

Q. Do you know whether you found that African-American smokers are more likely to smoke cigarettes than cigars?

MR. BROOKEY: Objection, foundation.

THE WITNESS: I don't know.

BY MS. CORASH:

Q. The same questions regarding the second minority groups you identified, Hispanics. Do you have data on whether Hispanics are more likely to smoke cigarettes than cigars, if they smoke at all?

A. We do have data.

Q. What does it show?

A. I cannot recall.

Q. And is that data which is published?

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A. I frankly cannot recall if we've published those data, or from those data.

Q. Is this data which was collected as part of the IE or under a separate grant?

A. The data that I can remember, that I recall, would be as part of the IE, yes.

Q. Can I assume from that it's either been published or you are precluded from making it available?

MR. BROOKEY: Objection --

MS. CORASH: Let me rephrase the question.

Q. Is it data you can make available to us?

A. The data sets that I referred to before as not available remain not available. Whether there are relevant data in the previous evaluation, I'm not sure.

MS. CORASH: I have no further questions.

EXAMINATION (RESUMED)

BY MR. CAFFERTY:

Q. Dr. Johnson, I'm Pat Cafferty and I asked you questions yesterday, and I have a few more questions to ask before I turn it over to some other

people.

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First, in August of 1999, the Center for Disease Control published a report entitled "Best Practices For Comprehensive Tobacco Control Programs." Have you reviewed that report?

A. Oh, yes, sometime ago.

Q. Have you considered that report in forming the opinions that you expressed yesterday?

MR. BROOKEY: I'll object it's compound, but he can answer.

THE WITNESS: The suggestions that I made yesterday did not derive directly out of the report.

BY MR. CAFFERTY:

Q. Did you consider that report in preparing your Position Paper?

A. Same answer.

Q. Did you consider that report in preparing your declaration?

A. Same answer, yes.

Q. Have you discussed the need for a further ETS warning program with anyone in the tobacco control section?

MR. BROOKEY: Objection, compound.

THE WITNESS: All aspects of tobacco control that we could think of and get to, get discussed in our interactions with them, yes.

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BY MR. CAFFERTY:

Q. Have you discussed specifically with anyone in the tobacco control section the opinions that are expressed in your Position Paper?

MR. BROOKEY: Objection, compound.

THE WITNESS: Yes, and no, not in regards to the Position Paper. The general position that I take that is expressed in the Position Paper I have promoted widely, so in that sense, yes.

BY MR. CAFFERTY:

Q. Who have you discussed your general approach with?

A. In general?

Q. In the tobacco control section.

A. The people who would generally be at those meetings would be Bill Rupert, who is at the tobacco control section and is defacto overseeing the evaluation contract. Until recently, Michael Johnson also, who has now left DHS. There's a larger group of people that they bring into those meetings, people who are concerned with designing various aspects of the campaigns. I can't tell you the names of those people. I don't recall the names of all those people. Sometimes it's 12 or 15 people in the room.

(Miss Corash left the deposition.)

BY MR. CAFFERTY:

Q. What have you told people from the

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tobacco control section about the need for further ETS warnings?

MR. BROOKEY: Objection, compound.

THE WITNESS: I told the people from the tobacco control section that consistent with the message I tried to deliver yesterday, that very careful consideration of the decision criteria relevant to the targeted populations needs to be considered, that conveying simply the long-term health consequences of ETS exposure is not adequate, and may be a waste if one does only that.

BY MR. CAFFERTY:

Q. Anything else?

A. I'm sure there are other things, it's been discussed widely.

Q. What actions has the tobacco control section taken in response to the opinions that you expressed to them?

MR. BROOKEY: Objection, foundation, compound.

THE WITNESS: Certainly in regards to the one I just referred to, none that I've detected.

BY MR. CAFFERTY:

Q. What actions does the tobacco control section intend to take in response to the opinions you just described?

MR. BROOKEY: Objection, foundation, compound.

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THE WITNESS: I don't know.
BY MR. CAFFERTY:
Q. Does the tobacco control section agree with those opinions?
MR. BROOKEY: Objection, foundation, compound.
THE WITNESS: I don't know.
MR. CAFFERTY: Let's mark this one.
(The document referred to was marked by the reporter as Defendants' Exhibit 63 for identification and is attached hereto)
BY MR. CAFFERTY:
Q. Dr. Johnson, I'm showing you a document that's been marked as deposition Exhibit 63. Have you seen that?
A. I have seen that.
Q. What is it?
A. It's a working draft of paper to report some of the findings and conclusions in regards to ways that people quit smoking, and as influenced by mass media.
Q. On Wednesday, the day before we commenced this deposition, Mr. Brookey's office provided us a copy of, or actually this copy of the report that you just described.
Do you know why we were provided a copy of this?
MR. BROOKEY: Objection, irrelevant. He can

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answer if he knows.

THE WITNESS: I was requested to provide a copy to Mr. Brookey, and I understood it to be because you had requested it

BY MR. CAFFERTY:

Q. What other documents were you asked to provide to Mr. Brookey that you understood we had requested?

MR. BROOKEY: Objection, irrelevant, and I believe we have already gone through this, but he can answer.

THE WITNESS: One was -- my memory is not absolutely clear on this. I believe that there was a letter in which three documents were requested, and I believe that Mr. Brookey conveyed that there was a fourth manuscript or article that was requested. One of the requests was for the draft of the latest independent evaluation report. That was one of them. There was this, which is the -- there was another that was -- that we discussed yesterday, an abstract that has been accepted for the paper to be presented at the American Public Health Association in November `99. There is a fourth, but I cannot remember.

BY MR. CAFFERTY:

Q. What relevance does deposition Exhibit 63 have to the opinions expressed in your

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1 program?
2 MR. BROOKEY: Objection, foundation,
3 compound, could be interpreted as calling for a
4 legal conclusion, but you can answer.
5 THE WITNESS: Give me a moment to refresh
6 myself on exactly what we reported. This is an
7 extraordinarily complex set of studies, with an
8 incredible number of manuscripts associated with it,
9 so I don't recall the details of this.
10 I think the relevance, at least one
11 point of relevance is to my repeated -- repeatedly
12 stated conclusions that one has to identify
13 particular targets, and target them specifically in
14 terms of their -- characteristics of those
15 populations that are relevant. One of the
16 characteristics of those populations that I know I
17 referred to yesterday was their different use of
18 media channels.
19 BY MR. CAFFERTY:
20 Q. Is there any other basis for its
21 relevance to the opinions you expressed in the
22 declaration?
23 MR. BROOKEY: Same objections.
24 THE WITNESS: I think at the moment I don't
25 think of any that stand out that are not

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elaborations on the same point.

BY MR. CAFFERTY:

Q. Let me direct your attention back to

the declaration, which is Exhibit 58, and specifically to paragraph 10. What is the basis for your statement that children are at a heightened risk of experiencing negative health consequences due to ETS?

A. Heightened, we mean by that -- let me clarify what is meant by that is that the younger child is at higher risk than the adult. The higher risk may be then the adolescent is at higher risk than the adult. This is not an area of my direct expertise. I do no research in that area. I'm citing or referring to data, published data that the combination of rates of metabolism, the higher concentrations of toxic substances in the tissues, and the additional factor, the tissues are in the young child more sensitive to toxic exposure.

Q. In your declaration, you also express the opinion that persons exposed to ETS have a 24 times greater risk of contracting lung cancer than persons who are not exposed to ETS. What's the basis for that conclusion?

MR. BROOKEY: Objection, lack of foundation, and I would request that counsel point the witness to that statement in the declaration.

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BY MR. CAFFERTY:

Q. Do you know where that is in your declaration?

A. Not offhand.

MR MILES: Pat, he's indicated he has knowledge of this. Ask him what his knowledge is on that issue. You don't have to point him to the declaration. He either knows it or he doesn't.

MR. CAFFERTY: Actually in here.

MR. BROOKEY: Part of the problem is there's a predicate to the question.

MR MILES: Why don't you rephrase it and ask what his knowledge is as he sits here, without looking at the document.

BY MR. CAFFERTY:

Q. What is your understanding as to what the relative lung cancer rates are for non-smokers exposed to ETS, as compared to non-smokers not exposed to ETS?

A. Published reports in the scientific journals, which we cite here.

Q. Let me direct your attention to --

MR MILES: Hang on a second, ask him what his knowledge is, does he have any knowledge as opposed to just pointing to someone else.

MR. BROOKEY: Should we take a break for a

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minute and you all can discuss strategy? I think it's inappropriate to argue back and forth about how to ask the questions.

MR MILES: I'm trying to save a little time so I don't have to repeat it. It would be faster if counsel does it now.

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MR. BROOKEY: That's between the two of you.

BY MR. CAFFERTY:

Q. What knowledge do you have of the relationship?

A. I'm sorry?

Q. Between lung cancer rates for non-smokers exposed to ETS, and non-smokers not exposed to ETS?

MR. BROOKEY: Objection, asked and answered and vague and ambiguous.

THE WITNESS: To repeat, from the published scientific literature and presentations at scientific meetings. I am persuaded that there's a greatly accelerated or increased risk for those who are exposed to tobacco smoke in the environment. In other words, ETS, as compared to those not exposed.

BY MR. CAFFERTY:

Q. What is the knowledge that you have about what those differences in rates are?

MR. BROOKEY: Same objections.

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THE WITNESS: The best expression of that estimate of risk was reported here.

BY MR. CAFFERTY:

Q. By here, do you mean --

A. In the declaration.

Q. Let me direct your attention to paragraph 33 on page 7 --

MR MILES: Before you --

MR. BROOKEY: Let's take --

MR MILES: Before you refer to the document, ask him what he knows without pointing to somebody else's stuff. If he has any actual knowledge himself, as opposed to just pointing to someone else's stuff.

MR. BROOKEY: My understanding is that Mr. Miles is going to have an opportunity to question this witness, and I understand his frustration, because I'm sure he doesn't want to go back over ground that was or should have been covered before.

MR MILES: It's true, it's early in the morning, and I'm crabby, and I apologize.

MR. BROOKEY: I really do think it's unfair for these colloquies to be taking place after every question or two, and I don't think it's fair to the witness, and if you want to take a break and you

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guys can discuss this, including whether this entire area should be deferred until Mr. Miles begins questioning, I would be happy to do so.

MR MILES: We don't need a break. I'm sure Mr. Cafferty understands exactly what I'm asking him to do.

MR. CAFFERTY: Let's move forward, and Mr. Miles will hold his questions until his time comes, okay.

Q. Referring to paragraph 33 on page 7, do you have that in front of you?

A. I do.

Q. This is in Exhibit 58. There you express the conclusion that a recent Meta analysis has chosen that a non-smoker who lives with a smoker has a 24 times higher rate of incidence of lung cancer than a non-smoker who doesn't live with a smoker. Do you see that?

MR. BROOKEY: I'll object to the question as mischaracterizing the statement as a conclusion. There's no foundation, but he can answer.

THE WITNESS: The Meta analysis concluded that the risk of a person who lived with a smoker, a non-smoker who lived with a smoker is 24 times higher.

BY MR. CAFFERTY:

Q. Is that your understanding of what

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the Meta analysis showed?

A. Yes.

Q. What is the basis of that understanding?

A. The basis of understanding that is having read the report, considered the methodology, had discussions with people about the report in various studies underlying the Meta analysis, which were numerous studies, that this is a reasonable estimate.

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Q. Who did you have the discussions with?

A. I can't say. I mean it's scientific meetings at various places. This is brought up, what is the best estimate, yes.

Q. And based on all those discussions, what you understand the best estimate to be is 24 times?

MR. BROOKEY: I'll object as mischaracterizing the prior testimony, but he can answer.

THE WITNESS: I take it as a very good estimate.

BY MR. CAFFERTY:

Q. Do you know what the relative risk was that the Meta analysis showed?

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MR. BROOKEY: Objection, vague and ambiguous.

THE WITNESS: I can't recall offhand.

BY MR. CAFFERTY:

Q. Do you know what a relative risk number means?

A. Certainly.

Q. What does it mean?

A. Approximately the increased probability compared to a reference standard that a person is going to experience the disease.

Q. What would the relative risk number

be for something that is 24 times the incidence rate of something else?

MR. BROOKEY: Objection, foundation, incomplete hypothetical, calls for speculation, but he can answer.

THE WITNESS: 24

BY MR. CAFFERTY:

Q. 24.0?

A. The numbers are never that precise, but in the range of 24.

Q. What would a relative risk of 1.24 indicate with respect to a comparison between the two groups?

MR. BROOKEY: Same objections.

THE WITNESS: A 24-percent increased risk.

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BY MR. CAFFERTY:

Q. What was the relative risk that Hackshaw et al. determined --

A. I cannot remember. I don't have the paper here and I can't remember.

MR. CAFFERTY: Could you mark this next.

(The document referred to was marked by the reporter as Defendants' Exhibit 64 for identification and is attached hereto)

BY MR. CAFFERTY:

Q. Dr. Johnson, I'm showing you a document that's been marked as Exhibit 64. Do you have that in front of you?

A. Yes, I do.

Q. Have you seen that document before?

A. It's hard to say that I've seen this --

MR. BROOKEY: Hold on. I need to interpose an objection as this document being the literal document versus the study itself, and I assume the question was directed towards the latter?

MR. CAFFERTY: Let's take the latter first.

THE WITNESS: I'm not sure which the latter was, repeat.

BY MR. CAFFERTY:

Q. Have you actually seen this form of

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document before?

A. I don't know if I've seen this form.

Q. Is deposition Exhibit 64 the Hackshaw et al. 1997 report that's referenced in paragraph 33 of your declaration?

A. It appears to be.

Q. Referring to deposition Exhibit 64, can you tell me what the relative risk was that Hackshaw et al. found as a result of their Meta analysis?

MR. BROOKEY: Objection, foundation, possibly compound.

THE WITNESS: The easiest way to get that is to assume the abstract is an accurate representation of the paper, and as I recall, the excess, it

does -- I have no reason to think this is not an accurate representation of the findings. I would have to reread the whole thing to be sure, that the excess risk of lung cancer was 24 percent in non-smokers who live with a smoker.

BY MR. CAFFERTY:

Q. How does that 24 percent compare to the 24 times higher number that's indicated in your declaration at paragraph 33?

MR. BROOKEY: Objection, foundation.

THE WITNESS: It suggests what is in the statement was an inadvertent misprint, that it

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should more properly read 24 percent greater risk.
BY MR. CAFFERTY:
Q. So is what you're saying that your declaration in paragraph 33 is incorrect, that rather than saying 24 times higher, it should have said a 24 percent increase?
MR. BROOKEY: Objection, compound, argumentative, mischaracterizes prior testimony, but he can answer.
THE WITNESS: Based on looking at this again and considering now the wording here, I would replace 24 times greater or higher with a 24 percent greater risk.
MR. CAFFERTY: Mark this please.
(The document referred to was marked by the reporter as Defendants' Exhibit 65 for

identification and is attached hereto)
MR. BROOKEY: Can we go off the record for a second?
MR. CAFFERTY: Sure.
(Discussion held off the record.)
MR. CAFFERTY: Back on the record.
Q. Dr. Johnson, I'm showing you a document that has been marked as deposition Exhibit 65. Deposition Exhibit 65 is a mockup of a warning sign. Have you ever seen a warning sign like

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deposition Exhibit 65 in areas where public smoking is permitted?

MR. BROOKEY: I'll object as irrelevant to the subject matter of this litigation and not reasonably calculated to lead to the discovery of admissible evidence, and beyond the scope of the expert declaration, but he may answer.

THE WITNESS: As a general consumer, I don't spend much time in areas where smoking is permitted, so it's highly unlikely that I've seen it.

BY MR. CAFFERTY:

Q. Do you recall any instances in which you've seen such a sign in an area where public smoking is permitted?

A. No, I do not.

MR. BROOKEY: Same objections.

BY MR. CAFFERTY:

Q. Assuming that a sign like this were

posted in an area where public smoking was permitted, would a sign like this, in your opinion, constitute a clear and reasonable warning under Proposition 65 to persons exposed to environmental tobacco smoke in that area?

MR. BROOKEY: Same objections as before, plus lack of foundation, plus incomplete hypothetical, plus compound, if that wasn't in there before, and obviously calling for a pure legal

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conclusion, beyond the scope of the expert declaration or this deposition, but if he can answer it, then he may.

THE WITNESS: Within the scope of my expertise and as a cognitive and communication health scientist, I would not consider this to be a clear and reasonable communication.

BY MR. CAFFERTY:

Q. Would you consider it to be a clear and reasonable communication within the meaning of Proposition 65, as you understand it?

MR. BROOKEY: Again, I'll object. I think I can incorporate all prior objections.

THE WITNESS: Again, within, standing within my area of expertise, I would not consider it to be a clear and reasonable warning.

BY MR. CAFFERTY:

Q. How are you defining what your field of expertise is for purposes of answering that

question?

MR. BROOKEY: I would object as asked and answered several times yesterday. To the extent we're talking about the legal definition of an expert under the Code of Civil Procedure or the Evidence Code, then it calls for a legal conclusion, but he can answer.

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THE WITNESS: In the previous response, I tried to express it as a cognitive and communication scientist in health.

MR. CAFFERTY: I don't have any further questions. Let's take a quick break.

(Brief recess.)

EXAMINATION

BY MR. KAPLAN:

Q. Dr. Johnson, my name is Brad Kaplan. I represent Lorillard Tobacco Company. I'm the one that gets to go next. Before I start the questions, I was intending to -- let me do a follow-up to a question Mr. Cafferty asked.

You had indicated in his last couple of questions that you did not believe that the warning sign, which we just attached as Exhibit 65, provides a clear and reasonable warning of the carcinogenicity of the environmental tobacco smoke, and you answered that as a cognitive and

communications scientist; is that correct?

MR. BROOKEY: I'm going to object, mischaracterizing the prior testimony. I'll need to incorporate all the objections that went into the predicate to this question, and it's also compound, but he can answer it.

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THE WITNESS: If I understand, I think -- I think I understand the question, and the answer is yes.

BY MR. KAPLAN:

Q. In your opinion, based on your knowledge of Proposition 65, does the sign which is sitting in front of you designated as Exhibit 65 meet the legal requirements for a warning?

MR. BROOKEY: Okay --

MR. KAPLAN: Pursuant to Prop 65.

MR. BROOKEY: Thank you for adding the tag line. Again, I'll object on foundation grounds. I'll object as irrelevant to the subject matter of this litigation and not reasonably calculated to lead to the discovery of admissible evidence, and I'll object once more as clearly by its literal terms calling for nothing but a pure legal conclusion, but also clearly calls for testimony regarding an area outside the witness' expertise, and that now has been answered I think three or four times, so we'll object on that basis as well, but he once again can answer this question as to his

personal knowledge.

THE WITNESS: As I confessed to yesterday early, I have no legal training, so I can't comment on whether it does in fact meet the requirements

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under the law.

MR. BROOKEY: I also should add that it calls for speculation.

MR. KAPLAN: Let me change gears --

THE WITNESS: I would like to add that I would hope in interpretation of the law, the meaning of a message to an individual would be considered, and that if this communication has no meaning in terms of decision making to the intended audience, then that would be considered as complying with the law.

BY MR. KAPLAN:

Q. Do you have an understanding of whether the meaning of the message is considered in complying with the law, pursuant to Prop 65?

MR. BROOKEY: Again I'll object, irrelevant to the subject matter of this litigation, not reasonably calculated to lead to the discovery of admissible evidence, calls for an area outside the expert declaration and this expert deposition. Calls for speculation. You can answer.

THE WITNESS: Repeat the question please.

MR. BROOKEY: I also should object on foundation and incomplete hypothetical grounds as

well.

THE WITNESS: I'm sorry, I still don't understand the question.

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BY MR. KAPLAN:

Q. You just indicated that it was your hope that the meaning of the message was considered in the law in determining its adequacy, correct?

A. Correct.

Q. What I'm asking you now is I understand that may be your hope. The question is is it actually considered in determining whether the message is legally adequate pursuant to Prop 65, to your knowledge.

MR. BROOKEY: Same objections, and now also in its rephrasing it clearly calls for nothing other than a pure legal conclusion, but he can answer.

THE WITNESS: I have no knowledge of whether the authors of that law or the courts that rule on it consider it. I have no knowledge.

BY MR. KAPLAN:

Q. When you were first retained in this matter, and I apologize, I may ask a couple of questions that were asked yesterday as foundation to get me to where I want to be. When you were first retained with respect to preparing your report, which was later turned into your declaration, what was your understanding of the scope of your assignment?

MR. BROOKEY: Objection, lack of

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foundation. He can answer if it's possible to.

THE WITNESS: My understanding when I was approached by Dean Cowan at the Annenberg School was that I was being asked to help prepare it as it ultimately turned out, to oversee, lead the development of a Position Paper that would speak to the questions of warnings in regards to health hazards with a specific focus ultimately on warnings in regards to ETS exposure.

BY MR. KAPLAN:

Q. Did you understand the scope of your assignment included determining the adequacy of the warnings pursuant to the Proposition 65 program?

MR. BROOKEY: I have to object on all the same grounds as before. It's also hopelessly vague and ambiguous, because there is no Prop 65 warning program with regard to any of the matters at issue in this litigation. I think it's an incomprehensible question given that fact. The scope of the expert witness' retention has been probed at length and I understand, Mr. Kaplan, you weren't here yesterday for much of that, so you may not realize you're treading old ground, but all of this has been asked and answered a number of times, so there's absolutely no foundation for the question. It's irrelevant to the subject matter of this litigation and not reasonably calculated to

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lead to the discovery of admissible evidence. It's compound, but in light of all those objections, if he possibly can understand that kind of nonsensical question, he's free to answer.

THE WITNESS: My understanding of what I was being asked to do did not include the charge or the expectations that I would be commenting in any way specifically on Proposition 65.

BY MR. KAPLAN:

Q. Was it your intent in drafting your report, which was later turned into your declaration, that you would be designing a methodology to enable the establishment of an adequate warning program for environmental tobacco smoke?

MR. BROOKEY: I'll object again, another asked and answered question to the point of harassment. It's irrelevant to the subject matter of this litigation and not reasonably calculated to lead to the discovery of admissible evidence. It's vague, but if it's possible to, then you may answer.

THE WITNESS: It was a long question and complex. Could I ask you to -- could I have it read back.

(Record read.)

THE WITNESS: It was not my intent. As must have come across here, it certainly has been my hope

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that it would help lead to an adequate program.
BY MR. KAPLAN:
Q. In your opinion, if the defendants to these lawsuits were to follow the methodology established in your report and your declaration and then implemented a plan in accord with that methodology, do you have an opinion as to whether or not that plan would comply with Proposition 65?
MR. BROOKEY: Objection, foundation, incomplete hypothetical, calls for speculation, unless you're offering, Mr. Kaplan. It's compound, vague and ambiguous and calls for a pure legal conclusion, but if it's possible for the witness to answer as to his personal knowledge, then he may.
THE WITNESS: If there were a program following the outline that I have suggested here in these two days, adequately delivered, monitored, guaranteed for continuity, delivered by people who are knowledgeable experts in the field, I would hope that it would be -- it would meet the requirements under the law.
BY MR. KAPLAN:
Q. If the defendants to this lawsuit followed the methodology detailed in your report and in your declaration and implemented a plan in accordance with that methodology, in your opinion, would that plan provide an effective warning regarding environmental tobacco smoke.

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MR. BROOKEY: Same objections, but he can answer.

THE WITNESS: May I ask for clarification of the question, because the question is around the issue of if the defendants delivered, and I would have to ask if you mean if the defendants themselves delivered such a program.

BY MR. KAPLAN:

Q. As opposed to?

A. As opposed to it being delivered by a mutual party.

Q. Yes, if the message was delivered by the defendants.

MR. BROOKEY: Same objections as before, and it's also compound.

THE WITNESS: I would have serious problems with that, because I think there's good evidence that there would be a serious credibility problem if the program were directly linked to, identified with the tobacco industry.

BY MR. KAPLAN:

Q. If the defendants followed the methodology detailed in your declaration and in your report, and then implemented a plan which was in accord with that methodology, in your opinion, would that plan provide a clear and reasonable warning regarding ETS?

MR. BROOKEY: Same objections as before.

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It's also now asked and answered, because it's substantively identical to the one asking him to -- improperly asking him to make a legal determination under Proposition 65's requirements, but if it's possible for him to answer, then he may.

THE WITNESS: It's implicit in my recommendations that any such man should be developed and delivered by a group totally independent of the tobacco industry.

BY MR. KAPLAN:

Q. Sir, is it therefore your opinion that if a message is delivered by the tobacco industry, even which complies with your methodology, that message would not be effective or clear and reasonable in discussing the health hazards of ETS?

MR. BROOKEY: All the objections as before, and now it's compound on multiple, multiple levels, still calling for a legal conclusion and asked and answered six or seven times now. It also gets outside the area of the witness' expertise, but he can testify within that area as to his knowledge.

THE WITNESS: I would like to within the area. It is my opinion that I think can be backed by an evidential base that the critical element in the effectiveness of such a campaign is whether or not information is relevant to the decision criteria of the targeted persons or groups.

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element that is referred to in the declaration that we haven't talked to before this point today, is the element of credibility of source. That's a critical element and that would most certainly have to be looked after. The source must be a credible one.

BY MR. KAPLAN:

Q. Doctor, in your opinion, can the tobacco industry disseminate an effective warning regarding the carcinogenicity of environmental tobacco smoke, even if it follows your methodology?

MR. BROOKEY: I'm going to incorporate all the prior objections, and I'm trying to grant counsel some leeway, but you're basically asking the identical question phrasing slightly different ways, each of which is enormously problematic -- let me finish making my objection, and we have a limited amount of time, so I'm not instructing him not to answer these questions, but we are so far afield from the subject matter of this deposition.

I would exort you to reconsider spending the entire time undertaking this ultimately futile and irrelevant tact, but he's welcome to answer this, again subject to all the objections.

THE WITNESS: It is my opinion that if the outline of the plan were followed as I've intended

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it, to express it, which means, which includes the neutral source delivery, that such a program would be -- could be very effective.

BY MR. KAPLAN:

Q. In your opinion, if defendants follow your methodology but they deliver the message, can the message -- can an effective warning regarding ETS be delivered?

MR. BROOKEY: Objection foundation, incomplete hypothetical, calls for speculation, compound, vague and ambiguous, asked and answered, asked and answered, asked and answered, harassing, irrelevant to the subject matter of this litigation and not reasonably likely to lead to the discovery of admissible evidence, outside the scope of the expert proceedings, and calls for a pure legal conclusion. But if it's possible to answer it, then the witness may.

THE WITNESS: As I understand the question, to me, it comes close to being a nonsequitir, because critical elements, as I've expressed it, is credibility, and as I've also expressed it, I see no way that the industry itself as the agent of delivery can meet that criteria.

BY MR. KAPLAN:

Q. To your knowledge, has your methodology as described in your declaration ever

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been used in a practical application?

A. I spent much of yesterday describing the usage across a number of applications in our laboratories, especially I focused on our

laboratories.

Q. Is it your understanding that your methodology as described in your declaration has been used, and that an advertising campaign was designed based on that data, which has then been used in the general public?

MR. BROOKEY: Objection, clearly very compound, but if it's possible to answer, go ahead.

THE WITNESS: It's not possible for me to answer. I don't understand it.

BY MR. KAPLAN:

Q. Am I correct your declaration presents a methodology for determining the structure of a media campaign?

A. No, I suggest the outline of a methodology. The methodology itself would be much more detailed.

Q. Are you aware of any organization utilizing the methodology as drafted in your declaration to develop an advertising campaign?

MR. BROOKEY: Objection, lack of foundation, and in light of the prior answer, lack of foundation

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is evident, mischaracterizes the prior testimony. He can answer.

THE WITNESS: There's very little in the written statement that that leads directly to a methodology. There is much more in my testimony yesterday and perhaps a little today that would

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suggest that, what a methodology might be. There was a lot in my testimony yesterday about how one develops such a methodology, how that methodology is carried out here at USC, and there is in fact a similar methodology at other leading research centers in health promotion, so there is a good foundation for that across a number of health risks.

BY MR. KAPLAN:

Q. Let me pose to you a hypothetical. Assume that if the defendants send out a flier which is 8 1/2 by 11 inches and the flyer is sent out to each person in California which says, in English, quote: "Warning, tobacco smoke is known to the State of California to cause cancer and reproductive toxicity," close quote.

I would like you to further assume that that flier is sent out once every three months for a year. In your opinion, is that an effective warning to the public in general of the carcinogenicity and reproductive toxicity of ETS?

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MR. BROOKEY: I'll object as lacking foundation, incomplete hypothetical, calls for speculation to the extent it goes well beyond Prop 65's requirements, and is irrelevant to the subject matter of this litigation, and not reasonably calculated to lead to the discovery of admissible evidence.

To the extent it calls for a legal determination as to whether this hypothetical, a never undertaken activity, would comply with the requirements of Proposition 65, it calls for a legal conclusion and clearly is outside the scope of this witness' area of expertise. Subject to all of those objections, he may answer.

THE WITNESS: Speaking clearly from the standpoint of probable effectiveness of that kind of campaign, I would rate the probability as very, very, very low.

BY MR. KAPLAN:

Q. Doctor, I would like you to assume the same hypothetical, but this time instead of that flyer being sent out once every three months, it's now sent one time a month for a year. Would your answer change?

MR. BROOKEY: Same objections as before. They're also compound questions, but he may answer.

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THE WITNESS: It would not, my answer would not change, because the primary problems are two. One is credibility of source, and the second is conveying information relevant to the decision making criteria of targeted populations.

BY MR. KAPLAN:

Q. Doctor, I would like you to assume the defendants send out an 8 1/2 by 11 inch flyer to every person in the State of California which

stated, "Warning: Tobacco smoke is known in the State of California to cause cancer and reproductive toxicity," and I would like you to assume that flyer is sent out one time per week for a year.

In your opinion, is that an effective warning?

MR. BROOKEY: Same objections as before.

THE WITNESS: Same answer, and if it's three times a day, it would be the same answer, if I can shortcut the questions.

MR. KAPLAN: It does.

Q. Let me change the hypothetical slightly. Assume this time instead of the 8 1/2 by 11 inch flyer sent out to each person in California in English, it is now sent out in the native language of the person receiving it, and the text of the flyer still remains, "Warning: Tobacco smoke is known to the State of California to cause cancer and

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reproductive toxicity."

In your opinion, is this an effective warning, if this is sent out one time every month?

MR. BROOKEY: Same objections?

THE WITNESS: Again, from my area of expertise, the answer is no, and that is not to imply that language is not important, but in my parlance, language is a moderator variable, and let me say why. It is something that is necessary, but in no way sufficient for an effective

communication. Language, appropriate language.

MR MILES: Could you read that back.

(Record read)

BY MR. KAPLAN:

Q. Dr. Johnson, in your opinion, if a warning -- strike that.

In your opinion, is there a way that the tobacco companies could provide what you consider to be an effective warning if the language used is limited to the following: "Warning: Tobacco smoke is known to the State of California to cause cancer and reproductive toxicity," close quote?

MR. BROOKEY: I'll object on all the bases before, and I think the question is now pretty much incomprehensible, but if it's possible for him to answer, then he may.

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THE WITNESS: No.

BY MR. KAPLAN:

Q. Doctor, do you agree that no advertising campaign would reach 100 percent of the population of the State of California?

MR. BROOKEY: Objection, lack of foundation, calls for speculation, vague and ambiguous. He can answer if it's possible.

THE WITNESS: It's really hard to know. I think our own data would show that it's very hard to reach each and every individual.

///

BY MR. KAPLAN:

Q. Is there a level of dissemination of information which you consider to be successful when it does not reach the totality of the population of the State?

MR. BROOKEY: Same objections.

THE WITNESS: Successful in the criteria are variable and debated.

BY MR. KAPLAN:

Q. Let me see if I can rephrase the question for you then. Let's assume you're designing an advertising campaign to warn people of the carcinogenicity and reproductive toxicity of environmental tobacco smoke. At what percentage of the dissemination of the message would you consider

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the campaign to be a success?

MR. BROOKEY: Objection, lack of foundation, incomplete hypothetical, calls for speculation, vague and ambiguous.

THE WITNESS: First, I wouldn't define it in terms of general population reached. Consistent with my testimony previously, it would have to be defined in terms of reached to particular populations, and especially harder to reach and at risk populations. There the objective should be 100 percent. As I have already said, something, a figure in research is never attainable, would never show 100 percent. What then is the figure that you

would shoot for, as close to 100 percent as you could.

BY MR. KAPLAN:

Q. You've identified in particular two at risk populations, the African-American population and the Latino population.

MR. BROOKEY: Objection, completely mischaracterizes the prior testimony, including what we went over this morning with Miss Corash, as well as what is in the Position Paper and the declaration.

MR. KAPLAN: Let me rephrase.

Q. Doctor, in your opinion is the

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African-American population an at-risk population with respect to environmental tobacco smoke?

A. Yes.

Q. If you were designing a warning program to warn the African-American population in the State of California of the carcinogenicity and reproductive toxicity of exposure to environmental tobacco smoke, at what point, short of warning each and every African-American in the State, would you consider your warning program to have been successful?

MR. BROOKEY: Objection, incomplete hypothetical, calls for speculation, but he can answer.

THE WITNESS: Understanding that I would not

propose to only warn the population of the carcinogenicity of smoke, I would get as close to 100 percent as would be possible.

BY MR. KAPLAN:

Q. How close would that be?

MR. BROOKEY: Same objections.

THE WITNESS: It might be 95.

BY MR. KAPLAN:

Q. Doctor, if you reached 95 percent of the African-American population with the warning that environmental tobacco smoke is a carcinogen and reproductive toxicant, would you consider that to be

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a successful campaign?

A. No.

MR. BROOKEY: Same objections as before.

THE WITNESS: And my answer is no.

BY MR. KAPLAN:

Q. Why is that?

MR. BROOKEY: Same objections.

THE WITNESS: Because a campaign with the content that was described in your question would not meet the decision criteria for the at-risk populations.

BY MR. KAPLAN:

Q. If the message which you were disseminating to the African-American community in the State of California matched the criteria delineated in your declaration instead of merely

indicating the tobacco smoke is a carcinogen and a reproductive toxicant. Upon disseminating that message to 95 percent of the African-American population, would you consider it to have been a success?

MR. BROOKEY: Objection, lack of foundation, incomplete hypothetical, calls for speculation, compound, vague and ambiguous, but he may answer.

THE WITNESS: Let me say much of what I've suggested in the testimony here expanded upon the

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declaration, so if you were to allow in your question my expansion in the declaration about what the campaign should consist of -- first would you allow that in your question?

MR. KAPLAN: Let me rephrase the question.

Q. Assuming you put together a campaign of your own choosing to disseminate information to the African-American community in the State of California regarding the hazards of ETS, and assuming that message is received by 95 percent of the African-American population in the State of California, would you consider it to have been a successful program?

MR. BROOKEY: Same objections as before, but he may answer.

THE WITNESS: I can't say that putting together such a program would be a successful program. I would say that it's a successful program

if it achieves the outcomes.

BY MR. KAPLAN:

Q. What would you consider the outcomes to be which would have to be achieved in order for you to declare the program successful?

MR. BROOKEY: Same objections.

THE WITNESS: At the very least, that data would show that we would find that the audience received, understood and used in their decisions

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information that had met the definition of what was decision-relevant criteria for that population.

BY MR. KAPLAN:

Q. In your opinion, is a campaign successful -- strike that.

In your opinion, would an environmental tobacco smoke warning campaign be successful if it does not change people's behavior?

MR. BROOKEY: Objection, incomplete hypothetical, calls for speculation. Elements of it are irrelevant to the subject matter of this litigation and not reasonably calculated to lead to the discovery of admissible evidence. Other elements of it clearly call for nothing other than a pure legal conclusion as to which this expert is not offered or able to offer a conclusive opinion, but within his expertise and personal knowledge, and subject to those objections, he may answer.

THE WITNESS: When we define success in our

health promotion campaign, we do it in several ways, so the ultimate interest for someone in health in preventative medicine is risk reduction. So the ultimate success of a campaign should be assessed in terms of risk reduction, so that risk reduction concern here is exposure to ETS, so that would be the ultimate test. There would be other levels of

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concern, other levels of concern when we consider the question of success as well.

MR MILES: Could you read that back.

BY MR. KAPLAN:

Q. I think Mr. Miles has a point. I think you explained going about determining how it was successful but didn't indicate whether or not it was successful.

In your opinion can a program be deemed to have been successful with respect to warning people about environmental tobacco smoke if the program does not change people's behavior?

MR. BROOKEY: Same objections as before.

THE WITNESS: I thought I said what I meant to say in the lengthy response, that behavior is the ultimate test, and that a campaign, from a public health perspective, from a risk reduction perspective, would only be successful if it reduces risk. And in this case, the risk is associated clearly unquestionably with exposure to environmental tobacco smoke.

MS. SHERIDAN: Is it possible to get a yes-or-no answer to the question? It's phrased that way.

MR. BROOKEY: It's not proper to tell the witness how to answer the questions. He's answered the question now twice.

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BY MR. KAPLAN:

Q. And perhaps I don't understand your answer. Can you think of any situation in which you would consider an ETS warning campaign to be successful if it doesn't change behavior?

MR. BROOKEY: Again, complete lack of foundation, there is an incomplete hypothetical and calls for speculation, probably hopelessly vague and ambiguous and compound, and again, to the extent it's talking about campaigns that are beyond the scope of Proposition 65, the question includes within its scope matters that are neither relevant to the subject matter of this litigation, nor reasonably calculated to lead to the discovery of admissible evidence.

To the extent it calls for an expert legal opinion as to whether the purely hypothetical warning campaign meets the requirements of Proposition 65, it's clearly beyond the scope of this witness' expertise and asks for nothing other than a pure legal conclusion. It's also been asked and answered twice, but again, he may answer it, if

it's possible to.

THE WITNESS: Even given those limitations and reservations, a campaign that could be demonstrated to have delivered messages that were

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understandable, that were understood and used by -- that were understood and were relevant to the decision making criteria and used in those decisions by the targeted audience, I would deem to be of limited success, but in some ways successful.

BY MR. KAPLAN:

Q. Am I correct then, doctor, that it's your opinion that if a message regarding environmental tobacco smoke is understood by the target audience, is delivered in a way which is relevant to the target audiences decision-making process and is used by the target audience, the fact that the target audience chooses to ignore the message does not render the campaign unsuccessful?

A. Not --

MR. BROOKEY: All the same objections as before, mischaracterizes prior testimony and I think is fairly incomprehensible, but if he understands it, he can answer it.

THE WITNESS: Not if the target audience ignore the message, but if the target audience includes the message in their considerations and still acts in a risky way, then the campaign will have met limited success.

BY MR. KAPLAN:

Q. Do you agree, doctor, that people see and understand messages regarding health hazards in

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their daily lives and choose not to heed those warnings?

MR. BROOKEY: Objection, so overly broad as to clearly include matters that are beyond the scope of this witness' expertise, and also irrelevant to the subject matter of this litigation, and not reasonably calculated to lead to the discovery of admissible evidence. It is also vague and ambiguous and compound, but he's free to answer.

THE WITNESS: Clearly people are bombarded with all kinds of contradictory messages and cannot by definition be consistent with all those messages, so I agree.

BY MR. KAPLAN:

Q. I would like to go back to one of the hypotheticals I was talking about a little bit earlier. I would like you to assume that the defendants send out an 8 1/2 by 11 inch flyer to each person in California which says on it in English "Warning: Tobacco smoke is known to the State of California to cause cancer and reproductive toxicity." I would like you to further assume that that flyer is sent out once every three months for a year.

Which do you believe is more

effective at warning the populace in the State of

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California of the carcinogenicity and reproductive toxicity of environmental tobacco, that campaign or the campaign which has been ongoing pursuant to Prop 99 funding?

MR. BROOKEY: Objection, lack of foundation, incomplete hypothetical, calls for speculation, irrelevant to the subject matter of this litigation and not reasonably calculated to lead to the discovery of admissible evidence, vague and ambiguous and compound.

THE WITNESS: I couldn't make a hypothesis about that. It's a research question, but from research methodology, it would be very difficult to, in my opinion, to detect an effect, because we're talking about such very, very small probable effects in either case.

BY MR. KAPLAN:

Q. Is it your opinion that the probable effect of the Prop 99 funded warning campaign regarding environmental tobacco smoke is comparable to the effect if the defendants were to send out an 8 1/2 by 11 inch flyer to everybody in the State of California in English three times -- once every three months which says "Warning: Tobacco smoke is known to the State of California to cause cancer and reproductive toxicity"?

MR. BROOKEY: Same objections.

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THE WITNESS: I don't know, but these are hypotheticals that are irrelevant to the California situation, because what one has would be a message on top of an existing program, not a message -- the test is not possible. There is an existing program in California. That program hopefully is not going to go away. What it will take to accelerate that program, when at what point one reaches something like a threshold effect that would accelerate the effect on ETS exposure, it's very difficult to speculate on.

BY MR. KAPLAN:

Q. So you're unable to do a comparison of -- strike that.

Let me make sure I understand that. Are you able to draw a comparison between the effectiveness of the hypothetical flyer campaign that I just mentioned and the Prop 99 campaign?

MR. BROOKEY: Again, I have to incorporate all the objections before to the extent the question incorporates the prior questions. It's also been asked and answered, and now it's becoming harassing and argumentative. It's mischaracterizing the prior testimony, but he can answer it again.

THE WITNESS: As far as I can see, there will not exist a situation, there cannot exist a situation in California where one can -- could compare -- where one could compare a tobacco control

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program and its effects on ETS exposure to a flyer campaign as you've described that is not also occurring at the same time in the California tobacco control program is occurring.

BY MR. KAPLAN:

Q. In your opinion, if the defendants sent out an 8 1/2 by 11 inch flyer to each person in the State of California which says in English, "Warning: Tobacco smoke is known to the State of California to cause cancer and reproductive toxicity," if that flyer was sent out one time a month for a year, would that give any additional benefit to the population of the State of California, beyond what is being given to them pursuant to the Prop 99 warning program?

MR. BROOKEY: Objection, foundation, incomplete hypothetical, calls for speculation, vague and ambiguous, compound, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, asked and answered several times now. But he can answer it again.

THE WITNESS: Yes, I do think I've answered that and I'll try to answer it in the same way, because I believe it, and that is that as you describe it, as I understand you've described it, the additional campaign would fail to contain the essential elements, the elements that I believe to be essential for an effective campaign or increment

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in total aggregate campaign effectiveness.
BY MR. KAPLAN:
Q. In your opinion, would there be any additional effectiveness?
MR. BROOKEY: Same objections, and now it's clearly harassing. I again request that the same question not be repeated over and over and over again. I'll let him answer it yet again.
THE WITNESS: Any effect in scientific terminology is different from lay terminology. In scientific terminology, that means an effect that's observable, detectable, and that's what I have to limit my response to, and I would expect to not -- I would not except a campaign that consisted solely of what you've described in your question as producing an observable -- scientifically observable effect.
BY MR. KAPLAN:
Q. In your opinion, would there be a scientifically observable effect if defendants sent out 8 1/2 by 11 inch flyers to each person in the State of California which said, "Warning: Tobacco smoke is known to the State of California to cause cancer and reproductive toxicity," one time a week for a year --
MR. BROOKEY: Same objections as before. You have now been asking several versions of the same question for more than an hour, and I would like to remind counsel we only have until 12:30

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today, and I know Mr. Miles is anxious to get --

MR. KAPLAN: You don't need to keep that admonition going, that wastes time.

MR. BROOKEY: But the witness may answer this question yet another time.

MR MILES: One of the difficulties is that because you object to the form, you require people to correct their questions to deal with your objections, which we're entitled to do. If you could cut back on your highly technical and unnecessary objections to form, that might save us some time.

MR. BROOKEY: I haven't heard a single question in this line of questioning that was corrected pursuant to objections. Do you want to stipulate that all of these are subject to the same list of objections?

MR MILES: No, you should make your objections, but you're making a lot of technical objections to form that do require corrections, and then you object when people ask a question about the same topic on the theory that it was asked and answered, which really takes up a lot of time. Since you tend to make long speaking objections, you're burning up a lot of the time.

MR. BROOKEY: I obviously disagree with the latter part of that, but I would like to again just

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question that was rephrased or corrected pursuant to an objection, so I think your entire premise is faulty, but let's get back to --

THE WITNESS: Different point, could I leave the room to get more fluids in here?

MR. BROOKEY: Sure, why don't we take a quick break.

MR. KAPLAN: I'm actually almost done.

THE WITNESS: You'll have to repeat the question.

MR. KAPLAN: Can I have it read back.

(Record read.)

THE WITNESS: Not by the criteria that I've described repeatedly.

BY MR. KAPLAN:

Q. In your opinion, would there be a scientifically observable effect if that same flyer program were done in multiple languages?

MR. BROOKEY: Same objections.

THE WITNESS: By the criteria that I've described repeatedly, I would not expect an effect.

BY MR. KAPLAN:

Q. Am I correct that you would not expect to see a scientifically observable effect if the frequency were increased even more than once per

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week?

MR. BROOKEY: Same objections.

THE WITNESS: By the same criteria, you are

correct.

MR. KAPLAN: That's all I've got for now. I'll let Mr. Miles go.

MR. CAFFERTY: Let's take the break for the fluids.

(Recess taken)

EXAMINATION

MR. MILES:

Q. Doctor, my name is Don Miles and I represent Defendant R.J. Reynolds Tobacco Company in the litigation that you've been asked to be an expert in. I have more questions than we can complete today. I have no doubt of that. I'll be forthright with you on that issue, given that you have to leave early today, but I would like to make some headroad on the process, and to get some idea of what you have done to prepare yourself to make a presentation to a court in this state as part of a request to ask that court to make a multi-million dollar decision, so let me start with that.

At the time that you were asked to sign this declaration in which you indicated that

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the warnings in the State of California that had taken place in the past were inadequate, had you undertaken a specific effort to find out what warnings in fact had been given that you were saying

were inadequate?

MR. BROOKEY: I'll object, no foundation to that question, it's vague. I object to the entire preface that was recited on the record before the question, but the witness may answer.

MR MILES: Let the record reflect it's by my clock 11:14.

Q. Go ahead, doctor, I would like to hear your answer, please?

A. I'm sorry, my train of thought was broken by the discussion and I need to hear the question again.

MR. MILES: Read it back please.

(Record read.)

THE WITNESS: First I'm not sure that I was asked to sign a statement saying that the warnings in the past were inadequate, but I will say that that is my position.

MR. MILES:

Q. Let me just stop. At the time that you were given a declaration, did it include the language that one of your three goals was to point

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out that existing warnings about environmental tobacco smoke had been insufficient?

A. Those were my conclusions.

Q. The declaration was drafted by the attorneys, wasn't it?

MR. BROOKEY: Objection, argumentative,

asked and answered. We went over the preparation for deposition probably an hour yesterday, and it mischaracterizes prior testimony.

He can answer the question.

BY MR. MILES:

Q. Isn't it true, sir, that this declaration was prepared by the attorneys and given to you for signature, wasn't that your testimony yesterday?

MR. BROOKEY: Same objections, and now it's compound.

THE WITNESS: The declaration that I signed was prepared by the attorneys, yes.

BY MR. MILES:

Q. And it included the language I just read, that it had as one of its goals to point out that existing warnings about environmental tobacco smoke had been insufficient?

A. Could you refer me to what you're reading please?

Q. Do you recall that language being in

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the declaration?

MR. BROOKEY: Are you denying the witness' request, Mr. Miles?

MR MILES: I'm asking him what his memory is at this point.

THE WITNESS: I cannot --

MR. BROOKEY: Then I'm objecting as

harassing, but he can answer.

THE WITNESS: I cannot verify from memory the specific phraseology that you just read to me.

BY MR. MILES:

Q. How about look at page 2, paragraph 8, line 17 on that page. The first line under the heading "Executive Summary," and specifically what you point out as being your number 1 goal of your declaration. Do you see that language I just quoted to you?

A. Yes, I do.

Q. And that refreshes your recollection that that was your number one goal in preparing this declaration?

MR. BROOKEY: Objection, a complete mischaracterization of the declaration, no foundation whatsoever for the question. He can answer it.

THE WITNESS: Number one in sequence, not

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necessarily number one in priority. I agree that this was one of the three goals.

BY MR. MILES:

Q. What was your number one goal in priority?

MR. BROOKEY: Objection, foundation.

THE WITNESS: I'm not sure there was a number one goal. There were the three goals that are stated here.

BY MR MILES:

Q. Given that this language, that your first listed goal was to point out that existing warnings about environmental tobacco smoke had been insufficient is contained in the declaration that you signed for the purpose of having it submitted to a court in this state, what if any effort did you make before you put your name on this declaration to find out what existing warnings had been given in the State about environmental tobacco smoke?

A. The primary source of data for me is the tobacco control independent evaluation.

Q. So are you saying that you just read a single document to find out what warnings had been given?

MR. BROOKEY: Objection, mischaracterizes the witness' prior testimony.

THE WITNESS: As testified to yesterday, I

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wrote or participated in the writing of that document that had -- that is to my knowledge the most complete evaluation of tobacco control activities in the State of California.

BY MR. MILES:

Q. Here is what I'm trying to find out, and maybe you can just answer me in language that a jury would understand. What did you do to identify what specific warnings had actually been given to the people in the State of California about

environmental tobacco smoke, before you signed your name in a declaration submitted to the San Diego Superior Court saying that those warnings were inadequate, or insufficient, to use your express terminology?

MR. BROOKEY: Is the question finished?

MR MILES: Yes.

MR. BROOKEY: I'll object as asked and answered, but he can answer it again.

THE WITNESS: I think the most outstanding, the most relevant thing that I did was to review very carefully the evaluation, the most complete evaluation of this or any other tobacco control activities that have ever been undertaken anywhere in the world, as far as we know, in which I was one of the leaders in putting together.

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A second thing that I did was to review other databases that might also, or that is to say other reports, reports from other databases also on tobacco control in California.

BY MR. MILES:

Q. Is there anything else that you did to find out what warnings there had been in California that you were now saying were insufficient?

A. This is pretty close to the best that we thought we could do. Offhand I can't think of additional things that we did, keeping in mind all

of the aspects of the evaluation that I described in this room yesterday.

Q. You're saying "we." I want to know what you did. What did you do besides look at the independent evaluation, which I take is a document, and look at some other databases, what specifically did you do?

A. Well, you're wrong in what you take. It's not just a document. It is a process that's been going on for several years, as I described in some detail yesterday and should be in the record. I reviewed the findings from that. Also, as we went over yesterday, I reviewed the findings from other published literature on the tobacco control program findings from other researchers on what has been

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happening in California in regards to tobacco control over the last several years.

Q. What literature is there that you looked at that lists what warnings that people in California have received regarding environmental tobacco smoke?

A. All the literature that I used is cited in the declaration.

Q. Tell me what the literature is that refers to the specific warnings that have been given?

MR. BROOKEY: Counsel, I would prefer you to ask him a question, rather than give him a demand.

I'll let him answer this. It might be a good point to, since we're not videotaping the deposition, to object as harassing and unduly intimidating, the volume with which the questions and commands have been stated and directed towards Dr. Johnson, and I would also request that you tone it down just a little bit, but he can answer the question.

THE WITNESS: The outstanding --

MR MILES: Let me rephrase the question, because your counsel has made these objections that require me to rephrase it to make sure I've dealt with his objections, so rather than you give the answer and then me having to reask it and having to

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waste time and you're confused by what we're doing, let me just ask it again.

Q. Tell me, if you would, sir, what articles you have read that list the specific warnings that have been given to people in the State of California regarding health risk associated with ETS?

A. The published evaluation, independent evaluation of the tobacco control program, in several of its chapters, which I can't cite at the moment, but several of its chapters deal with exposures of the population and various subpopulations to environmental smoke, and those are the ones primarily -- or those are the ones that we dealt with.

Also, there is a paper by Pierce that's also cited that we went over yesterday that contains relevant data.

Q. Does the Pierce paper actually list the warnings that some people received, for example saying that the American Cancer Society has provided a warning and that the Lung Association has provided a warning, this organization, that organization, is there actually a listing in the Pierce article of --

A. I don't recall.

Q. Do you recall what articles you have looked at that actually list any specific warnings

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that people have received, so that you would know what the warnings were that you were saying were not sufficient?

MR. BROOKEY: I'll object that it's compound, but he can answer.

THE WITNESS: I don't recall where or if that's reported.

BY MR. MILES:

Q. In the tobacco control evaluation, you said it included references in several chapters. What are the documents you're referring to specifically?

A. The easiest way to do it I think would be by Exhibit Number. Number 60.

Q. That's the document you're referring to?

A. When I referred to the report of the independent evaluation, the published report of the independent evaluation, that's the document I was referring to.

Q. Would you point out to me where it is in this document that there's a listing of the specific warnings that are being received by people in the State of California?

A. In response to my last question, I said I didn't know where or if there had been a

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reporting of the listing, or a listing of warnings in California.

Q. Have you, as part of your process of putting together this declaration that you signed for submittal to the court, created your own list of the warnings that people in California receive about environmental tobacco smoke?

A. I have not personally.

Q. As you sit here now, what warnings are you able to identify, just off the top of your head, that have been provided by various sources to people in the State of California regarding risk associated with environmental tobacco smoke?

A. Off of the top of my head --

Q. I'm not encouraging you to be casual on this. I want a measure of how knowledgeable you are on this topic of what the warnings are, so I'm not encouraging you to be casual.

You show us how knowledgeable you are about the warnings that are out there that you're now saying are not sufficient.

MR. BROOKEY: I'll object to the entire speech that was given as again argumentative and harassing and designed to intimidate. It wasn't a question, it was inappropriate, but he can answer the question that was asked.

MR MILES: I didn't want him to be confused

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by the comment off the top of your head. Some people interpret that as being casual.

Q. Let me rephrase the question for you, doctor. What warnings have you become aware of, in the course of your experience in this area over the many years that have been provided to citizens in the State of California, regarding risk associated with environmental tobacco smoke?

A. As a part of the independent evaluation, it's been in doing that, we have gained access to the warnings that are done as a part of the California tobacco control program. Those are the ones that I and my team are most systematically aware I am also aware of sporadic campaign activities by the volunteer health organizations.

Q. Have you made any systematic effort to determine how frequent these warnings are of the volunteer health organizations?

A. No.

Q. When you say they're sporadic, are you saying your awareness of them is sporadic or that you've researched the frequency of them, and you know from that research that the warnings are only sporadic?

A. It is my impression, not only by exposure but by discussions with people in those

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organizations that they are sporadic in terms of the way you normally think of in terms of time, distribution and in terms of population distribution.

Q. When you say sporadic, how often are these warnings being given?

A. I don't know.

Q. Sporadic suggests that they're made more than once, true?

A. True.

Q. So it's your impression that the health organizations individually are warning on a repeated basis, but on a regular basis, is that a fair statement?

A. The health organizations serve a very useful role. Their campaigns are driven by a number of things, and so the timing is not well thought out, and they admit to that. So the frequency and distribution is not as systematic as that in the tobacco control program.

Q. Are you agreeing with me that what

you're saying is that they're making repeated warnings but not regular warnings?

A. Yes, as defined by what I said, yes, I agree with that.

Q. And I take it you quarrel with the timing of the warnings and think that timing of them

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could be better, is that true?

A. And distribution.

Q. In terms of your criticism of the health organizations as to the timing, tell me first of all, which health organization are you referring to when you criticize the timing of that organization's warnings?

A. First of all, I'm not criticizing, I'm commenting on them, and the three primary ones that have been involved in tobacco control warnings of which I'm aware of are the American Heart Association, the American Lung Association and the American Cancer Society.

Q. Are you commenting on the timing of the warnings of all three of these organizations, or just particular ones among the three?

A. My general impressions are with regards to all three.

Q. Let's take them individually then. With respect to the heart association, what is your observation as to what the timing has been of their warnings regarding environmental tobacco smoke?

A. As I said, my impressions that I'm relating are the three in aggregate, and I cannot speak accurately, I think, about each individual one.

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Q. Are you saying that you're aware that the heart association does warnings, but you're not that familiar with the timing of those warnings to comment on it, is that what you're saying?

A. I'm aware that each of the associations does tobacco warnings. Their mix of smoking and ETS warnings I'm not familiar with, nor their timing.

Q. Now with respect to your comment about the timing of the warnings of this collective three organizations, what is your comment with respect to the deficiency of that timing?

A. My comment is that in my judgment, it's not enough by virtue of the frequency and the distribution, and I would go further to say the content relevant to the points that I have been making throughout my deposition.

Q. Tell me what the content is of the warning that you're critical of?

MR. BROOKEY: Again, I'll object that it's a command and not a question, and it's inappropriate and intimidating, but he can interpret it as a question and then answer it.

MR MILES: I'll withdraw it.

Q. What is the content of these warnings that you're critical of?

A. It's been consistently the case in my

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observation across the various specific campaigns, not only of the three organizations but also the California tobacco control program, that the warnings have all been around -- I'm not sure they've all been, but for the most part, overwhelmingly around the theme of the relationship between exposure to ETS and long-term chronic health outcomes, which I believe to be insufficient to communicate an adequate warning to the highest risk and most vulnerable and hardest to reach populations.

Q. What would you have their warnings say, instead of what it does say with respect to long-term chronic health outcomes?

A. Again, consistent with the testimony that I've given here over the last two days, and the point that I've made repeatedly, a warning, in order to be potentially effective, has to address in language, and this terminology, the decision criteria that are relevant to an ETS exposure decision in the targeted audience.

Q. Have you formulated what you think their warning should have said, as opposed to what it did say?

MR. BROOKEY: Objection, irrelevant, not

reasonably calculated to lead to the discovery of

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admissible evidence.

THE WITNESS: Again, I've described numerous times here the guidelines for formulating specific communications to specific audiences that are at risk and hard to reach.

BY MR. MILES:

Q. Have you used those guidelines to form specific warning content, i.e. specific language that you think should have been used in these volunteer association warnings, other than what they did in fact put in the warnings?

A. Again, to repeat testimony that I gave yesterday, in our various research programs addressing various California populations, we have been very actively engaged in formulating such communications and we are now pilot testing the best way to put those communications together, and assessing them for their relative effectiveness.

Q. So the answer to my question is yes or no, doctor? Could you read my prior question back.

(Record read.)

BY MR. MILES:

Q. Is the answer to my question yes or no?

MR. BROOKEY: Objection, foundation, asked and answered. He can answer it again.

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THE WITNESS: The answer is that we have formulated and continue to actively formulate warning messages and delivery systems to meet the criteria that I've described and/or actively engaged in testing the effectiveness of those warnings.

BY MR. MILES:

Q. Have you come to a conclusion as to what the content of the warning these voluntary associations gave should have been?

A. I've described the kind of content or the criteria for the content. We have not come to a conclusion yet about what would be the best of all -- the best bet of all alternative expressions for the various populations.

Q. In addition to the warnings that are given by the three voluntary associations that you referred to and the tobacco control programs, have you identified other warnings that people in this state receive from sources regarding risk associated with environmental tobacco smoke?

A. Identified in the sense that that's in some of our databases. Yes.

Q. What are the sources of those warnings?

A. I can't cite those for you, because I don't know them.

Q. Do people get warned about risk associated with environmental tobacco smoke from

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their doctors?

MR. BROOKEY: Objection, foundation.

MR MILES: What is the foundational objection, counsel?

MR. BROOKEY: It's stated on the record.

MR MILES: No, you just said foundation. I don't know what you think is lacking.

MR. BROOKEY: You haven't asked him if he has knowledge as to what individual doctors in the State of California convey to individual patients who haven't asked whether there were any studies analyzing that in an expert deposition there needs to be some basis in fact for questions, so you don't get into the free-wheeling, far-ranging questions that we've been putting up with from a number of people for the last two days. I'm letting him answer the question though.

BY MR. MILES:

Q. Has there been any research on whether people are warned by their doctors about risk associated with environmental tobacco smoke?

A. Inclusive of environmental there's been research. Specific to environmental, I can't recall.

Q. So there has been research that people receive warnings about risk associated with ETS from their doctors?

A. There has been research on the

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frequency at which doctors bring up tobacco smoke exposure.

Q. What does the research show as to how often doctors talk to their patients about risk associated with exposure to tobacco smoke?

A. The research on the whole shows that doctors are woefully deficient in talking with their patients.

Q. Putting aside the value judgement, what does the research show you in terms of the numbers as to how often doctors talk to their patients about risk associated with exposure to tobacco smoke?

A. Woefully deficient, I didn't mean it to be a value judgment, but it's in terms of the probability of risk reduction. That's the way I was using the term woefully deficient.

I can't recall the precise numbers. There have been some studies showing in the range of 20 percent or so of people report that their doctors have raised the issue of tobacco smoke, but I don't know -- I cannot recall the range of estimates.

Q. Have there been reports that indicate that more than 20 percent of people report that their doctors have discussed with them risk associated with exposure to tobacco smoke?

A. There may be, I can't recall offhand.

Q. What's the highest number you recall?

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A. The highest number that I recall at this moment is in the range of 20 percent.

Q. Who did that report?

A. I can't possibly say.

Q. When you say that this is somehow woefully inadequate, why do you say that?

A. Again, every assessment that I'm making, probabilities is in terms of the criteria that I've described here again and again. That includes frequency of exposure to a message, appropriateness of the message to the audience in terms of their decision criteria, so deficient -- in order for a message to be effective it has to have all of those qualities in my judgment.

First of all, the average person sees his or her physician not very often. The probability of getting an ETS relevant message in that communication is low.

The research also shows that the content of that information when given is almost entirely around long-term health consequences, which I testified to repeatedly is inappropriate for California's populations at highest risk and hardest to reach. Furthermore, many of the hardest to reach popoulations are least likely to have a physician encounter.

Q. When you say that the messages are

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1 health consequences, are you referring to the fact
2 they're talking about the possibility of getting
3 cancer?
4 A. Physicians sometimes will cite
5 cancer. Most often probably, I don't know that for
6 certain, but also physicians also will mention heart
7 disease, chronic obstructive lung disease. The
8 occasional one would also mention asthma.
9 Q. These are what you characterize as
10 long-term health consequences?
11 A. I think so, yes, yes.
12 Q. Let me ask you about other sources of
13 warnings -- first of all, let me ask you this, have
14 you ever participated in any program where you
15 encouraged students here at the University of
16 Southern California Medical School to talk to their
17 patients about risk associated with exposure to
18 environmental tobacco smoke?
19 A. Yes.
20 Q. Have you ever done anything to
21 determine whether your students follow your
22 admonition?
23 A. No.
24 Q. Do you have any reason to believe
25 they're not following your admonition?

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MR. BROOKEY: I'll just object to this line of questioning as directed to the witness personally. This is an expert deposition in

connection with a preliminary injunction motion, so for the purposes for which we're here, it's irrelevant, but he's free to answer.

THE WITNESS: Yes.

BY MR. MILES:

Q. You do have reason to believe they're not?

A. Yes.

Q. What's the reason?

A. The reason is that the exposure in the curriculum -- you asked the question, you asked if we have done programs with our medical students that would encourage their communicating with their patients about -- I believe you said ETS. Our portion of the medical school curriculum is so limited. This exposure comes in a two-hour lecture in what I believe is their second year of medical school. A lecture that covers smoking, the risks of smoking, the risks of ETS, the epidemiology of it, what they might do, all in a two-hour lecture early in their second year, at least three years before their first clinical experience.

So I think the probability of that limited exposure, and this is not unusual in medical

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schools, the probability of that limited exposure having an impact on their patient counseling behavior, I don't think is great.

Q. Now, you, as I understand it, have an

endowed chair that's funded by Kaiser?

A. That's correct.

Q. And Kaiser is, as I understand it, the largest health care provider in the State of California. Is that your understanding also?

A. That's correct.

Q. I think the endowment is actually named after a former head of Kaiser, isn't it?

A. It's named after a man named Sidney Garfield who originated that concept. I don't believe he ever headed the organization under the name of Kaiser Family Foundation, but I could be wrong -- I mean under the name Kaiser Permanente. I believe it was given afterwards, but the name -- but I'm not actually certain, but he is the person who originated the idea.

Q. Are you aware that Kaiser provides information to its members, its patients about risk associated with exposure to environmental tobacco smoke?

MR. BROOKEY: Objection, foundation.

THE WITNESS: It is my belief that they do.

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BY MR. MILES:

Q. Do you have -- what do you base your belief on?

A. I am reasonably certain that I have read materials alluding to that and I'm even more sure that this has been discussed at Kaiser board

meetings that I was in attendance.

Q. Why were you attending a Kaiser board meeting?

A. Invited to present.

Q. What did you present on, what topic?

A. I presented on our research in substance abuse prevention broadly. Tobacco, alcohol, so-called illicit drugs.

Q. When you say the warnings regarding ETS are insufficient, have you evaluated whether or not the warnings given by Kaiser are insufficient in terms of their content and manner of delivery?

MR. BROOKEY: I'll object as compound, but he can answer.

THE WITNESS: No, I haven't evaluated that.

BY MR. MILES:

Q. Are you aware that Blue Cross provides information to its subscribers about risk associated with environmental tobacco smoke?

MR. BROOKEY: Objection, foundation.

THE WITNESS: It's my belief that they do.

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BY MR. MILES:

Q. What is that belief based on?

A. Similar sources of information, which include having read references to it.

Q. What have you read with respect to what Blue Cross communicates to its subscribers regarding risk associated with ETS?

A. My recall is only that they believe they have such a program.

Q. Have you done any investigation to determine whether the warning campaign that's being undertaken by Blue Cross for its subscribers is insufficient?

A. I have not.

Q. Are you aware of the Sutter Hospital or Sutter Health Care Delivery System in California?

A. I am not aware of them or their programs.

Q. Are there other providers of health care in California in terms of insurers or HMO that you have received information that that provider is providing ETS information to its members or patients?

A. I am aware of the USC medical plan, which is a provider, yes.

Q. What information does USC medical

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plan provide to its members or patients regarding risk associated with environmental tobacco smoke?

A. As a subscriber to the plan, I'm aware, and that's my only basis of knowledge about what is in the plan, I have seen one newsletter that contained -- one newsletter or flyer, I can't be sure in my recall, that had a short warning reminder on environmental tobacco smoke exposure is hazardous to your health. In terms of chronic diseases, there

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may have been a reference to asthma, I don't recall.

Q. Did you feel that the information being provided by USC was insufficient to alert its members to the fact that there may be risk associated with exposure to environmental tobacco smoke?

A. Yes, I did.

Q. Did you communicate your criticism of that warning to anyone at the University of Southern California?

A. I've had several discussions with the chair of the Department of Family Medicine about how we might help them improve on their delivery of preventative services, with the expression that I'm particularly concerned about services in regards to tobacco use and exposure.

Q. Specifically with regard to the newsletter that you saw that you've receive as a

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subscriber to the USC medical plan, what was it about the language of that that you thought was not adequate to inform you that there were risks associated with exposure to environmental tobacco smoke?

MR. BROOKEY: Objection, irrelevant to the purpose of this deposition, or probably this lawsuit. You're now asking him a question as a percipient witness, but he can answer.

THE WITNESS: Again, related to previous

testimony. Given that USC, I believe is the largest private employer in Los Angeles and has a hugely varied population from people of the highest levels of academia accomplishment, to people who are in the food service system and have far less opportunities for educational exposures relevant to ETS.

It was my impression that the language associated with ETS exposure to long-term health risks was not sufficient, again, under the theory that I've described, to be useful to the subscriber population in their decision-making processes.

BY MR. MILES:

Q. Are there other providers of health care or insurance in California that you have information indicating that that organization

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provides warnings regarding ETS?

A. I cannot cite specific ones. I'm aware that many HMO's have newsletters that they try to contain in their newsletters tobacco relevant educational information, and there may well be within that ETS related communications.

Q. With regard to the newsletter you looked at from USC, when was it you looked at that newsletter?

A. I can't say, I really can't. It would have been likely in the last two years.

Q. As a result of your discussions with

the chairman about your criticisms of that newsletter, has there been any decision made to your knowledge to do something in addition or differently than what was previously done?

A. If I may, I would like to correct a misunderstanding. My discussions with him have not been specifically about the newsletter, but about the service, the USC insurance plan medical offerings to its subscribers in general, the full array of them that would include the newsletter. I want you to understand that I was not speaking to him specifically about the newsletter.

Q. Were you talking to him about whether USC should pay for smoking cessation programs?

A. I'm not sure if that came up.

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Q. When you were talking about the offerings, what were you talking about?

A. Smoking cessation, prevention programs, ETS, dietary information, obesity control offerings, all of those were referenced. When we got into a discussion of USC's paying for smoking cessation programs, I do not remember.

Q. Does USC offer smoking cessation programs?

A. I'm aware of some.

Q. Have you done anything to determine whether the smoking cessation programs offered discuss risk associated with environmental tobacco

smoke?

A. I do not know that.

Q. Have you done anything to determine whether any of the smoking cessation programs in the State of California do or don't talk about risk associated with environmental tobacco smoke?

A. I don't know that.

Q. Have you ever recommended to anyone that smoking cessation programs include a discussion of ETS?

A. In the sense that in public health meetings, that we have often discussed what ought to be in various programs. These meetings have often

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included representatives of the health care industry, so in that sense, yes.

Q. Now yesterday you indicated that --

A. Might I say one more thing in regards to that?

Q. Certainly.

A. We have an advisory board here of some of the leaders in the health care industry who were trying to help us to make our educational programs more relevant to their offerings to what they do. We also use that by engaging them in what we do. Our intention is that that will spill over into their practice in their various institutions, so that's another process that I'm engaged in.

Q. You indicated yesterday that one of

the "Buckle Up" campaigns, or campaigns to encourage use of seatbelts had had some success because there had been an effort to impose mandatory legislation -- or legislation making use of seatbelts mandatory, and that the media coverage of legislation and the controversy about it had been educational. Am I remembering your testimony correctly?

MR. BROOKEY: I'll object because I'm not sure. To the extent it mischaracterizes the prior testimony, I'll object but let the witness answer.

THE WITNESS: That was part of my -- the

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evidence that I discussed, yes.

BY MR. MILES:

Q. So is it your observation that the media coverage of a legislative consideration of a health-related risk has some impact in making the populace aware of the risk that's being addressed?

MR. BROOKEY: I'll object as incomplete hypothetical and calls for speculation, but he can answer.

THE WITNESS: I think the Finish experience would certainly suggest that it can have an effect.

BY MR. MILES:

Q. You would agree that there's nothing different about Finns than Californians where a discussion about whether or not smoking should be banned in any public place would not make

Californians aware that there might be risk associated with environmental tobacco smoke, would you agree?

MR. BROOKEY: I'll object as lacking foundation, and it's vague to me at least, but if he understands the question, he can answer it.

THE WITNESS: I wouldn't agree that the Finnish experience is very similar. In regards to the "Buckle Up" campaign in Finland is very similar to what we experience in regards to tobacco in

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California

BY MR. MILES:

Q. Would you agree that the media coverage of proposed legislation regarding restrictions on people's ability to smoke cigarettes in the presence of other people at various locations has had the effect of informing people living in this state that there are risks associated with environmental tobacco smoke?

A. It may have, but the reason the Finish experience is so different is that in Finland, it was a pretty one-sided issue. To my awareness, there was no one arguing that buckling up was not good for you.

Q. Have you tracked the media coverage in any particular location regarding risk associated with environmental tobacco smoke?

A. Yes.

Q. What have you done in that regard?

A. As a part of the newspaper and magazine monitoring system that I described yesterday, that we clip and review all articles relevant that we can find in the systematic search with reference to tobacco. That's one of the search words. ETS is another search word, so that is included in that database.

Q. Once the article has been clipped, is

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it retained in some sort of file or storage?

A. For a period and then destroyed. After coding, after reading by multiple readers separate coding, we've done reliability checks across the coders and established that it's reliable and valid reading and coding, then the article gets destroyed.

Q. Before it's destroyed there is a permanent record made of the fact that the article appeared, is that true?

A. That's true.

Q. And I take it that record includes some coding of the content of the article?

A. Correct.

Q. Would the coding include a reference to risk associated with ETS?

A. Reference to risks associated with ETS, I'm pretty sure it does.

Q. Does the coding include where the

article appeared?

A. Yes.

Q. And does it include when the article appeared?

A. It includes a full citation, the source date, page and column.

Q. Is there any summary read of these

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articles in terms of year-end analysis of how much coverage there was for a particular issue, or something like that?

A. That is a part of the report in the independent evaluation.

Q. You're talking about Exhibit 60 now?

A. Yes.

Q. Where does that appear in Exhibit 60?

A. It begins on page 105.

Q. I don't see anything in 105 about articles. I see information about ads. Am I missing something? I meant page 106, I'm sorry.

A. It appears in this report that the part of the data from that monitoring system that was focused on is advertising, correct.

Q. I was asking you about the summary of the newspaper articles. You have seen summaries that have been prepared of what media coverage there is on tobacco-related issues, is that true?

A. I'm not sure what summaries that you're referencing.

Q. Have you seen a summary prepared regarding the media coverage that's gathered, coded and put into a computer on a systematic basis?

A. In our system are you asking?

Q. Yes.

A. I am not sure that we have written a

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summary as yet of the content of articles in that database.

Q. How long have you been clipping these articles, and by you, I mean probably USC does it?

A. Yes.

Q. How long has the University of Southern California been systematically clipping and coding newspaper articles related to tobacco smoke, including environmental tobacco smoke?

A. This began in -- began with the 1996 date, so this was the period of this data collection, so it's about mid-1996.

Q. Did you say there's a record destruction program where these newspaper articles are destroyed at some point on a systematic basis?

A. When the storage rooms fill up and we have systematic in that sense, when we have reviewed them, coded them, done the reliability checks, entered the data into data sets, verified those data sets are good, at the time after that that the storage rooms fill up, we start throwing out the ones that have been processed.

Q. When do they start throwing out the ones that have been processed?

A. I'm sorry, I don't know. It's not on a time basis, it's on the basis of hey, we don't

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have anymore room.

Q. Who is it that oversees this monitoring of the newspaper coverage?

A. Dr. Boley Cruz.

Q. Has he to your knowledge ever done any sort of report on what's been done in terms of the results of all this clipping and monitoring?

MR. BROOKEY: I'm sorry, could I have that read back.

(Record read.)

MR. BROOKEY: I was going to object and defend Dr. Cruz' honor and point out the correct pronoun should be she.

BY MR. MILES:

Q. I apologize for that. I thought it was a male name. Has she done any sort of report of the monitoring program of newspaper coverage regarding tobacco smoke and ETS?

A. I can't remember. I'm sorry, I don't remember. We discuss the data as we're looking at them, and I don't remember what's gotten into written reports and what hasn't.

Q. How often does USC identify some sort of media coverage in the L.A. area related to

environmental tobacco smoke, on the average?

MR. BROOKEY: I'll object it's irrelevant to the subject matter of this litigation and not

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reasonably calculated to lead to the discovery of admissible evidence. You may answer.

THE WITNESS: I can't answer because I don't remember. It has been discussed. We've talked about it, but I'm sorry, I cannot remember.

BY MR. MILES:

Q. Any impression at all about how often something appears in the L.A. Times about ETS?

MR. BROOKEY: Same objections.

THE WITNESS: I'm sorry, I don't remember.

BY MR. MILES:

Q. You don't have any impression as to how often there's newspaper coverage, is that true?

MR. BROOKEY: Same objections, and now I think it's vague.

THE WITNESS: I know that it happens, I don't know.

BY MR. MILES:

Q. Is there any effort to monitor radio or television coverage of issues related to environmental tobacco smoke?

A. We've certainly wanted to do this. The answer is no.

Q. Have you made any effort to determine what information has been provided over the

television regarding risk associated, health risk

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associated with environmental tobacco smoke to people in the State of California?

A. Independent of the independent evaluation?

Q. No, in any way.

A. I just say that because with this evaluation we have not. We're in the process with the IRP, if you recall what that is, the Integrated Research Program, study of Pacific Rim populations and the Transdisciplinary Use Research Center to assess what television programs and radio channels, radio stations youth at various ages and various ethnic identities and subethnic group identities are watching and listening to.

A study that we are just undertaking is to take those programs that are most frequently mentioned by each of the targeted groups and monitor those programs or stations, in the case of radio, to do an analysis both in the entertainment -- both the programing time and in the advertising time of tobacco and alcohol related content.

Q. Would this include monitoring the newscasts, or is it restricted to entertainment shows?

A. It would include it if, which is unlikely to be the case, some subpopulation of youth said they watched the news.

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Q. Have you done anything to determine what percentage of youth watch the news?

A. Our preliminary research on that would suggest that the proportion is very low. Not only in watching the news, but reading newspapers. I cannot give you a figure, but very low.

Q. Did you put it within 10 percent of the population, what percentage are you talking to?

A. Maybe within 10 percent. It would be not more than 15 or 20 percent.

Q. What percentage of adults would watch the news on TV or read newspapers?

MR. BROOKEY: I'll object that it's compound. You can answer.

THE WITNESS: We have similar data. I cannot recall for adults. In television. The best memory for newspaper is fewer than 50 percent of Californians subscribe to newspapers who read newspapers, from our data.

Q. How about watching the news on TV?

A. That's the one I can't remember numbers around that.

Q. When you say less than 50 percent, how much less than 50 percent watch -- read newspapers --

A. It varies --

MR. BROOKEY: Hold on, I'll object it mischaracterize the prior testimony, which I think

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was subscribe, which is different from read, but he can answer the question.

MR MILES: Counsel, I think your objection mischaracterizes the answer. I think he said read or subscribe.

Q. Did I mishear you, Dr. Johnson?

A. I meant to say read or subscribe.

Q. When you say less than 50 percent, how much less than 50 percent was it?

A. The population as a whole, let's be sure we're -- I'm sorry, I've talked about several populations and media sources now. Could you remind me again what media source we're talking about.

Q. Newspapers.

A. And we're talking about adults or children?

Q. Adults.

A. It varied by ethnic group and by 20 or 25 percent across ethnic groups is the best of my memory, so that some ethnic groups may have been as low as the 20's. Some may have been a little over 50. Over 50, but not greatly over.

Q. When you say not greatly, how much over are you?

A. I can't remember. I would be surprised if it was much more over 60, but I can't remember the details.

Q. Which ethnic group was over 60

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percent possibly?

A. The highest rate I remember would have been among either Whites, non-Hispanic Whites or Asians, and I can't recall.

Q. Have you ever heard of an organization called ASH?

A. I've heard of it, yes.

Q. Are you aware that it provides information regarding risk associated with environmental tobacco smoke?

A. It's past 12:30.

Q. Let me withdraw that. Could I ask you to take the time to look at a couple of documents to tell us whether you recognize it or not, which I think will facilitate when we come back trying to get through stuff, we can do this in probably less than five minutes.

Would that be possible?

A. You're asking me to look at them?

Q. Just to tell me whether you recognize them.

A. If I recognize them.

Q. We'll mark the ones you do.

Is this a document that you recognize?

MR. BROOKEY: Before you ask the questions, do you mind if we could have this marked.

MR MILES: I think maybe in the interest of

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time I'll only mark the ones that he recognizes now and -- maybe we ought to mark them.

MR. BROOKEY: I think we ought to mark them, and I'll need a copy, too to look at. Let's mark them.

(The document referred to was marked by the reporter as Defendants' Exhibit 66 for identification and is attached hereto)

THE WITNESS: This has crossed my desk.

BY MR. MILES:

Q. You do recognize Exhibit 66?

A. If it's what I think it is, yes.

Q. Do you recognize this as a document that's put out by the people that run the Prop 99 program -- let me withdraw it.

Tell me what you understand this document to be.

A. I believe it's probably a document distributed by the Tobacco Control Program.

MR MILES: Let me hand you what we'll mark as 67.

(The document referred to was marked by the reporter as Defendants' Exhibit 67 for identification and is attached hereto)

BY MR. MILES:

Q. Doctor, do you recognize Exhibit 67?

A. I'm not sure I've seen it in the

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Spanish. Probably have, I'm not sure.

Q. I think if you look at the document past the cover you'll see it's not in Spanish. The Spanish is just a warning.

A. I'm vaguely aware of this, yes.

Q. Could you tell us what this is?

A. I'm very vaguely aware. It appears to be a report of the Tobacco Research Oversight Committee. It seems to lack the appropriate cover page. There's no clearly marked title to this.

MR MILES: Let me hand you the next one, which will be 67.

THE WITNESS: I'm sorry, but I am going to have to go. We said 12:30.

MR. MILES: When can we get together again, because we need to finish your deposition?

MR. BROOKEY: Obviously we're not going to reach agreement on this today, but the deposition is finished, both pursuant to the court's case management order and the agreement of the parties, and I'm sure you'll disagree with that, but that's certainly our position. We're not going to be scheduling another deposition session today.

MS. SHERIDAN: Just for the record, I would like to say on behalf of Brown & Williamson I've not been permitted to ask my questions, and I do have

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some questions, I don't have a lot. I know Don has not finished.

And I don't know where in the case

management order it says we were only entitled to have a day and a half with this witness. We've been cut short by his schedule, which I understand he may have had other engagements, but he did state that he had an opportunity to meet with you for 7 hours for a full day before we had a chance to depose him, and I would like us to try to work on our schedules and see if there's a chance we can pick a day next week. I think we've already identified Tuesday as the day we can come back and complete the deposition. We'll probably need it before we can complete our opposition to the preliminary injunction motion.

MR. BROOKEY: I think the case management order requires that the expert witness depositions of Plaintiffs' experts be concluded by September 3, and that's today. The understanding and agreement was that we only had a portion of the day today, and for that reason we were available to go late yesterday. Unfortunately, defendants failed to take measures to ensure that that was feasible with regards to the court reporter.

As for today, we discussed the possibility of starting early, and a number of

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people, including Mr. Miles, did not want to start early today, so again we can all make our speeches on the record or not, but that is certainly our position.

THE WITNESS: Excuse me, am I needed?

MR MILES: You're going to have to stay until 5:00, because counsel is saying when you leave now we don't get to ask any more questions, and we're in the business day, and we noticed your deposition to be here. You'll just have to stay.

MR. BROOKEY: That is completely inappropriate, harassing, intimidating and again, we are already well past the time at which the parties mutually agreed the deposition would conclude, so the deposition is concluded.

MR MILES: Counsel, I have never agreed that this deposition would be over if we allowed this witness to leave at noontime.

MR. BROOKEY: The deponent is leaving.

MR MILES: Thank you, doctor.

MR. CAFFERTY: I had one other procedural thing I was going to discuss with him, but we didn't have time for that. I gave him yesterday a check for eight hours. We spent six hours yesterday. We spent three and a half hours today, so I still owe him one and a half hours. I will be writing him a

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check for one and a half hours.

We have some very real concerns about the reasonableness of the $500 per hour rate. We reserve the right to object to that. We will write him a check for the remaining hour and a half, but we do reserve the right to object to the rate that

was charged.

MR. BROOKEY: That's fine.

(The deposition was adjourned another 12:40 p.m.)

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DECLARATION

I hereby declare I am the deponent in the within matter; that I have read the foregoing deposition and know the contents thereof, and I declare that the same is true of my knowledge except as to the matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under the penalties of perjury of the state of California that the foregoing is true and correct.

Executed on the _____ day of _____ 1999, at _____, California.

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W I T N E S S

I, GINA M. CLOUD, a certified shorthand reporter for the State of California, do hereby certify:

That prior to being examined, C. ANDERSON JOHNSON, the witness named in the foregoing deposition, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth pursuant to Section No. 2093 of the Code of Civil Procedure;

That said deposition was taken before me pursuant to notice, at the time and place therein set forth, and was taken down by me in shorthand and thereafter reduced to typewriting via computer-aided transcription under my direction;

I further certify that I am neither counsel for, nor related to, any party to said action, nor in anywise interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto

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subscribed my name this ____ day of _____,

1999.

_____

GINA M. CLOUD
CSR No. 6315

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